UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW MEXICO

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Case Title: Furr's Supermarkets, Inc.

Case Number: 01-10779

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UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW MEXICO

In re:
FURR'S SUPERMARKETS, INC.
Debtor. No. 11-01-10779 SA

MEMORANDUM OPINION ON DEBTOR'S MOTION FOR ORDER DETERMINING THAT THE DIRECTOR OF THE NEW MEXICO ALCOHOL AND GAMING DIVISION MAY NOT CONDITION APPROVAL OF THE TRANSFER OF DEBTOR'S LIQUOR LICENSES UPON PAYMENT IN FULL TO LIQUOR WHOLESALERS

This matter is before the Court on the Debtor in Possession's Motion for Order Determining that the Director of the New Mexico Alcohol and Gaming Division May Not Condition Approval of the Transfer of Debtor's Liquor Licenses upon Payment in Full to Liquor Wholesalers (docket 737)(the "Motion") and the objections thereto by the New Mexico Alcohol and Gaming Division (docket 797), Premier Distributing Company, Inc., National Distributing Company, Inc., New Mexico Beverage Company, Inc. and Southern Wine & Spirits, Inc. (docket 855), Desert Eagle Distributing Company of New Mexico, L.L.C. (docket 861), and Joe G. Maloof and Company (docket 863). Both the Debtor and Metropolitan Life Insurance Company ("MetLife")filed replies (docket 906 and 905 respectively). Also before the Court is the Stipulation between the Debtor and New Mexico Alcohol and Gaming Division in the Contested

Matter Arising from the Motion (docket 793). This is a core proceeding. 28 U.S.C. § 157(b)(2)(A) and (K).

The facts are not in dispute. The Debtor filed a motion seeking approval of the sale of substantially all of its assets to Fleming Companies, Inc. (the "sale motion.") The Debtor owns licenses that permit it to engage in the retail sale of alcoholic beverages in New Mexico (the "liquor licenses.") Under the terms of the Debtor's sale agreement with Fleming, Debtor is obligated to transfer the liquor licenses to Fleming or its designees. The State of New Mexico has filed a proof of claim for prepetition taxes owed by the Debtor. Debtor owes various liquor wholesalers for alcoholic beverages delivered to Debtor. The current state of the record does not indicate the value of any particular license, the dollar amount owed to any particular liquor wholesaler for delivery to any particular licensed premises, or the dates that the debts were incurred.

Debtor's Motion seeks declaratory relief 1) that Section 60-6B-3 is preempted by the United States Bankruptcy Code, 2) that the Director, Department and Division of the New Mexico Alcohol and Gaming Division would violate the automatic stay provisions of the Bankruptcy Code by conditioning a transfer of the licenses on payment of wholesalers' claims, and 3) that

the Director would violate the protection against discriminatory treatment provisions of the Bankruptcy Code by conditioning a transfer of the licenses on payment of wholesalers' claims.[1] The Debtor's Motion is supported by MetLife, Heller Financial,, Inc., Bank of America, N.A. and Fleet Capital Corporation, the lenders who extended postpetition credit to the estate pursuant to the Interim Order Authorizing Debtor to Incur Post-Petition Financing (docket 32) and the Final Order Authorizing Debtor to Incur Post-Petition Financing (docket 241) (together the "DIP Financing Order").

As discussed below, the Court finds that Section 60-6B-3 is not preempted by the Bankruptcy Code. The Court further finds that the declaratory relief requested is barred by the Eleventh Amendment, and makes other findings as well.

PREEMPTION

A. The State law.

The New Mexico statute in question, Section 60-6B-3 NMSA 1978 (1998 Repl.) provides:

> The transfer, assignment, sale or lease of any license shall not be approved until the director is satisfied that all wholesalers who are creditors of

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[1] Debtor's Motion does not contest the enforcement of any other provisions of the Liquor Control Act. Debtor's Reply, at 3. Docket 906.

> the licensee have been paid or that satisfactory arrangements have been made between the licensee and the wholesaler for the payment of such debts. Such debts shall constitute a lien on the license, and the lien shall be deemed to have arisen on the date when the debt was originally incurred.

A federal court is bound by a state's interpretation of the language of its own statutes and of the legislative intent behind them. Cordova v. Romero, 614 F.2d 1267, 1269 (10th Cir.), cert. denied, 449 U.S. 851 (1980).

The New Mexico Supreme Court construed Section 60-6B-3(E)[2] as creating a lien with "superpriority status over other lienholders" whose liens were unperfected prior to the wholesalers' extension of credit protected by the statute. What D'ya Call It, Inc. v. Sunwest Bank of Albuquerque (In re What D'Ya Call It, Inc.), 105 N.M. 164, 165, 730 P.2d 467, 468 (1986). Therefore, the Bankruptcy Court must also construe Section

60-6B-3 as creating a superpriority lien vis-a-vis all other prior unperfected lien claimants.

MetLife argues that the lien priority provisions in §60-6B-3 require that the liens of itself, Heller Financial, et al. take priority over any subsequent wholesalers' liens. Metropolitan Life Insurance Company's Reply, at 11-12. Docket

[2]The language of former Section 60-6B-3(E) is identical to current Section 60-6B-3.

905. And even a cursory reading of the second sentence of the statute and the New Mexico Supreme Court's decision in In re What D'ya Call It, Inc., 105 N.M. at 165, 730 P.2d , would seem to support that position. However, an examination of the statute, including an examination of the Supreme Court's decision in In re What D'ya Call It, Inc., and the history of companion provisions of the statute suggest that the argument does not obtain for MetLife the result it seeks.

The two sentences of Section 60-6B-3 appear to be reconcilable.[3] The first sentence of the statute requires unconditionally that the wholesalers debts be paid in full as a condition of transfer. The second section sets out priorities for the liens securing such debts based on the date the debts are incurred. The Supreme Court's decision in In re What D'ya Call It, Inc. says that a non-wholesaler lien "perfected under... applicable general law prior to the date the licensee incurred debts owed to wholesaler creditors" would take priority over the wholesalers' liens. 105 N.M. at

[3] "Legislative intent is to be determined from the language used in the statute as a whole, and each section should be construed in connection with every other section to reconcile different provisions to make them consistent. State v. Sinyard, 100 N.M. 694, 675 P.2d 426 (Ct. App. 1983), cert. denied, 100 N.M. 689, 675 P.2d 421 (1984)." D & M, Inc. v. United New Mexico Bank at Gallup (In re D & M, Inc.), 114 B.R. 274, 277 (Bankr. D.N.M. 1990).

165, 730 P.2d at 468.[4] Assuming sale proceeds sufficient to pay the wholesalers' claims in full plus all other liens, the second sentence of the statute does not come into play, since if all claims are being paid, their priority makes little difference. The first sentence would still be operative, since it requires payment in full on transfer. But assuming insufficient funds to pay the wholesalers and all other liens, then either the transfer does not take place at all, or perhaps the license is transferred subject to some remaining liens but with the wholesalers paid in full. In short, if there is a shortfall in sale proceeds, but there are enough funds to pay the wholesalers in full at transfer, the transfer may or may not take place. But if there are insufficient funds to pay the wholesalers in full at transfer (and assuming no other "satisfactory arrangements" are reached), there will be no transfer.

The Supreme Court's decision in In re What D'ya Call It, Inc. does not explicitly address the possibility of a shortfall in proceeds. The decision uses the term

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[4] "A lien pursuant to Section 60-6B-3(E) has a superpriority status over other lienholders, including the tax lien in favor of the State, unless the latter liens were perfected under Section 7-1-38 or under applicable general law prior to the date the licensee incurred debts owed to wholesale creditors." 105 N.M. at 165, 730 P.2d at 468. (Emphasis added.)

"superpriority", but in contrast to that term's commonly accepted meaning in a bankruptcy context[5], the term as used in In re What D'ya Call It, Inc. appears merely to refer to the fact that a wholesaler's lien need not be recorded to be effective against the world. 105 N.M. at 165, 730 P.2d at 468. Thus any suggestion in In re D & M, Inc., 114 B.R. at 278, that the term "superpriority" means that the wholesalers' liens are prior to a non-wholesaler lien "perfected under...applicable general law prior to the date the licensee incurred debts owed to wholesaler creditors", 105 N.M at 165, 730 P.2d at 468, would probably not be correct.

A partial history of a related statute, §60-7A-9, illustrates that the transfer provisions in the first sentence of §60-6B-3 very much reflect the intent of the legislature. New Mexico Beverage Co. v. Blything, 102 N.M. 533, 697 P.2d 952 (1985) started as a district court ruling holding, reasonably enough, that the provisions of the Thirty-Day Credit Law as it then existed meant that a wholesaler could not collect payment on transfer (or any other time) for sales made when one or more invoices were more than thirty days

[5] See, e.g., In re Life Imaging Corporation, 131 B.R. 174, 177 (Bankr. D. Co. 1991)(discussing Section 507(b).)

due.[6] By the time that the case was decided by the New Mexico Supreme Court in April 1985, the legislature had changed the statute to ensure that even those debts incurred in violation of the Thirty-Day Credit Law must be paid in full at transfer. See In re D & M, Inc., 114 B.R. at 277.[7]

And, as the New Mexico Supreme Court made clear in In re What D'ya Call It, Inc., the unrecorded wholesalers' liens even take priority over unrecorded state tax liens. 105 N.M. at 165, 730 P.2d at 468.

In summary, it may well be that MetLife and the other lenders have liens that have priority over some or all of the

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[6] Section 60-8A-5 NMSA 1978 (1998 Repl.) provided, and still provides, that "no action shall be maintained...to collect any debt for merchandise sold, served or delivered in violation of the Liquor Control Act."

[7] The effective date of the statute's amendment was June 14, 1985. As amended, the statute, §60-7A-9 NMSA 1978 (1998 Repl.), now reads (with the amending language emphasized):

> Credit extension by wholesalers.
> It is a violation of the Liquor Control Act for any wholesaler to extend credit or to agree to extent credit for the sale of alcoholic beverages to any retailer, dispenser, canopy licensee, restaurant licensee, club licensee or governmental licensee or its lessee for any period more than thirty calendar days from the date of the invoice required under the provisions of Section 60-8A-3 NMSA 1978. A violation of this section does not bar recovery by the wholesaler for the total indebtedness of the retailer, dispenser, canopy licensee, restaurant licensee, club licensee or governmental licensee or its lessee.

liens of the wholesalers. Nevertheless, if the transfers are to take place, the wholesalers' liens must be paid, in full, regardless of what happens with those or any other liens. §60-6B-3 NMSA 1978 (1998 Repl).

The Court also makes some additional observations. First, Section 60-6B-3 does not apply only to bankruptcy debtors or insolvents; it applies to all licensees without reference to financial condition. Second, as noted, the statute demonstrates a strong legislative policy that wholesalers be paid before any license can be transferred; the statute establishes a priority in payment for one particular group of creditors (wholesalers) in one asset (the license).[8] Finally, the Court finds that the lien created by Section 60-6B-3 is a "statutory lien" as defined by Bankruptcy Code section 101(53).[9]

B. Pre-emption standards.

> Our cases have established that state law is pre-empted under the Supremacy Clause, U.S. Const., Art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which

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[8] Inquiries about whether giving the wholesalers such favored treatment is good policy, or how that policy came to be enacted, is of course not the business of this Court.

[9] Statutory liens can be set aside if they become effective upon the debtor's insolvency or an equivalent event. 11 U.S.C. §545(1). Section 60-6B-3 is effective regardless of the debtor's financial status.

> its enactments pre-empt state law. Pre-emption fundamentally is a question of congressional intent, and when Congress has made its intent known through explicit statutory language, the courts' task is an easy one.
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> Second, in the absence of explicit statutory language, state law is pre-empted when it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively. Such an intent may be inferred from a "scheme" of federal regulation ... so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. Although this Court has not hesitated to draw an inference of field pre-emption where it is supported by the federal statutory and regulatory schemes, it has emphasized: "Where ... the field which Congress is said to have pre-empted" includes areas that have "been traditionally occupied by the States," congressional intent to supersede state laws must be 'clear and manifest.'"
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> Finally, state law is pre-empted to the extent that it actually conflicts with federal law. Thus, the Court has found pre-emption where it is impossible for a private party to comply with both state and federal requirements, or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

English v. General Electric Company, 496 U.S. 72, 78-79, 110 S.Ct. 2270, 2275, 110 L.Ed.2d 65 (1990)(citations omitted.)

1. The Bankruptcy Code does not explicitly preempt a state's rights to establish statutory liens.

No party argues that the Bankruptcy Code explicitly preempts a state's right to establish statutory liens.

Indeed, one of the fundamental principles in bankruptcy is that the Bankruptcy Code looks to state law definitions of property and interests in property. See Butner v. United States, 440 U.S. 48, 54-55, 99 S.Ct. 914, 917-18 (1979):

> Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving "a windfall merely by reason of the happenstance of bankruptcy." Lewis v. Manufacturers National Bank, 364 U.S. 603, 609, 81 S.Ct. 347, 350, 5 L.Ed.2d 323. The justifications for application of state law are not limited to ownership interests; they apply with equal force to security interests, including the interest of a mortgagee in rents earned by mortgaged property.

(Footnote omitted.) See also Barnhill v. Johnson, 503 U.S. 393, 398, 112 S.Ct. 1386, 1389 (1992)("In the absence of any controlling federal law, 'property' and 'interests in property' are creatures of state law.")(citations omitted.); Paul v. Monts, 906 F.2d 1468, 1475 (10th Cir. 1990)(Bankruptcy Code defines what interests of the debtor may become property of the estate, but nonbankruptcy law defines the scope and existence of those interests.)(citing California v. Farmers

Markets, Inc. (In re Farmers Markets), 792 F.2d 1400, 1402 (9th Cir. 1968)).

2. The Bankruptcy Code does not occupy the field of debtor creditor relations to the exclusion of state created statutory liens.

In general, the Bankruptcy Code preempts state law but only to the extent that the state law conflicts with federal law. Paul v. Monts, 906 F.2d 1468, 1475 (10th Cir. 1990). "The underlying creditors' rights asserted in bankruptcy proceedings are creatures of state law." Id. (citing In re Elcona Homes Corp., 863 F.2d 483, 486 (7th Cir. 1988)). Because preemption is partial, "it cannot be said that Congress has intended to 'occupy the field' leaving nothing to state law." Id.

Specifically, nothing in the Bankruptcy Code suggests that it was intended to so occupy the field of debtor-creditor relations that it would preempt state statutory liens. Artus v. Alaska Department of Labor (In re Anchorage International Inn, Inc.), 718 F.2d 1446, 1451 (9th Cir. 1983)("No statutory bankruptcy policy forbids a state from giving one creditor a greater right to payment of his claim from a given asset than that conferred on another.") In fact, Bankruptcy Code Section

545 recognizes the existence of statutory liens created under state law.[10]

3. New Mexico's Section 60-6B-3 does not conflict with the Bankruptcy Code or stand as an obstacle to the Code's full purposes.

Section 60-6B-3 operates independently from the Bankruptcy Code. If a Trustee or Debtor in Possession seeks to transfer a liquor license, the wholesalers must be paid in full. The net proceeds from the sale, after paying the wholesalers, go to the bankruptcy estate for distribution pursuant to the priorities set out in the Code. D & M, Inc., 114 B.R. at 276-77. See also Sulmeyer v. California Department of Employment Development (In re Professional Bar Co., Inc.), 537 F.2d 339, 340 (9th Cir. 1976)(Bankruptcy estate contains net value of liquor license after satisfaction of state's claims.) The transferor can comply with both statutes. Compare Moldo v. Matsco, Inc. (In re Cybernetic Services, Inc.), 252 F.3d 1039, 1045 (9th Cir. 2001)("State law

[10] "[W]hen a state-created entitlement is enforceable inside and outside bankruptcy, 'there is no reason stemming from the justifications underlying condemnation of state-created priorities ... to refuse recognition of the entitlement' in the bankruptcy situation." In re Anchorage International Inn, Inc., 718 F.2d at 1450, n. 3, quoting Jackson, Bankruptcy and the Creditors' Bargain, 91 Yale L.J. 857, 905-06 (1982). (Emphasis in original.) "All state-created entitlements act in favor of some group of creditors, but bankruptcy law generally recognizes them nonetheless." Id.

also is preempted 'when compliance with both state and federal law is impossible.'") (citation omitted.)

One underlying policy of the Bankruptcy Code is equal treatment of similarly situated creditors. Debtor's main argument is that Section 60-6B-3 upsets this equal treatment by elevating the wholesalers into a superpriority position, thereby frustrating the goals of the Bankruptcy Code[11]. However, under New Mexico law, the wholesalers are not in the same class as other creditors. Accord Anchorage International Inn, 718 F.2d at 1452 ("Creditors who hold prior rights under the Alaska statute [requiring payment of creditors of liquor establishment before transfer of liquor license] are simply not in the 'same class' as other creditors.") The legislature has, essentially, said that liquor wholesalers are in a favored position under New Mexico law. Nothing prevents a state from creating favored classes of creditors. Therefore,

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[11] This was also the argument in California v. Farmers Markets, Inc. (In re Farmers Markets, Inc.), 792 F.2d 1400, 1403 (9th Cir. 1986)(California statute on liquor license transfer "could arguably be cast as inconsistent with the bankruptcy process because parties claiming under it may fare better in bankruptcy than they would if there were no such statute. Yet this argument confuses the classification of an interest with the displacement of the Code's priority scheme. To classify what might otherwise be a lesser claim as a proprietary interest does not displace the priority provisions. It merely reclassifies an interest within that scheme.")

application of Section 60-6B-3 is not offensive to the operation of the Bankruptcy Code. There is no conflict, and no preemption.

ELEVENTH AMENDMENT

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XI. The Eleventh Amendment also extends to suits against States by its own citizens. Seminole Tribe of Forida v. Florida, 517 U.S. 44, 54 (1996); Chandler v. Oklahoma (In re Chandler), 251 B.R. 872, 875 (10th Cir. B.A.P. 2000) (citing Hans v. Louisiana, 134 U.S. 1, 10 (1890)).

Bankruptcy Code section 106 deals with waiver of sovereign immunity. To the extent section 106 is based on Article I of the Constitution, it is probably ineffective to waive a state's sovereign immunity. Board of Trustees of the University of Alabama v. Garrett, __ U.S. __, 121 S.Ct. 955, 962 (2001)("Congress may not, of course, base its abrogation of the States' Eleventh Amendment immunity upon the powers enumerated in Article I."); Thompson v. Colorado, ___ F.3d ___, 2001 WL 883305 at 3 (10th Cir. 2001) ("After Seminole Tribe, [517 U.S. 44 (1996)], only Section Five of the

Fourteenth Amendment stands as a recognized source of power by which Congress can abrogate Eleventh Amendment immunity.") Furthermore, Section 106(a) has been declared unconstitutional by the Bankruptcy Appellate Panel for the Tenth Circuit. Straight v. Wyoming Department of Transportation (In re Straight), 248 B.R. 403, 421 (10th Cir. B.A.P. 2000). Section 106(b), however, may have continuing vitality as a codification of Gardner v. New Jersey, 329 U.S. 565 (1947), which held that a state can partially waive its immunity by filing a claim in a bankruptcy. Wyoming Department of Transportation v. Straight (In re Straight), 143 F.3d 1387, 1390, 1392 (10th Cir.), cert. denied, 525 U.S. 982 (1998). That section provides:

> A governmental unit that has filed a proof of claim in the case is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose.

11 U.S.C. § 106(b).

In Straight the Tenth Circuit addressed the language "arose out of the same transaction or occurrence" and noted that it followed the language of Fed.R.Civ.P. 13(a) dealing with compulsory counterclaims. Straight, 143 F.3d at 1391. In this case, Debtor's Motion attempts to force the Director

to transfer liquor licenses without the Debtor's payment of wholesalers. This does not appear to be even remotely related to the State's proof of claim for pre-petition tax liabilities[12]. The Motion is not a counterclaim to the proof of claim, and Section 106(b) does not apply. Nor will the Court treat as a waiver the State's appearance at the hearing on the approval of the sale to Fleming, through its Taxation and Revenue Department counsel who announced that the State would not seek to block the sale but would assert a claim against the sale proceeds. In summary, the Court cannot find that the State waived its immunity or consented to suits related to its role as overseer of the state's liquor laws.[13]

The remaining question is whether the Debtor's motion is a "suit" to which the Eleventh Amendment applies. "The overwhelming view is that an adversary proceeding that names a

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[12] Debtor argues that under Straight, 143 F.3d at 1392, it is sufficient if the claim against the state and the state's claim both arise from operation of the "debtor's business". This is too broad a reading of Straight. The Straight Court found "sufficient evidence to remove all doubt that the filings of its [the state's] proofs of claim against the Chapter 13 case were linked to the decertification which prompted Ms. Straight's initial action." Id. at 1391. There was in fact a much greater nexus than just "Debtor's business."

[13] The State's appearance in this action to defend its Eleventh Amendment position obviates the need to rule on whether the wholesalers have standing to argue the State's Eleventh Amendment position.

State as a defendant and summons it to appear in federal court is a suit for Eleventh Amendment purposes." Chandler, 251 B.R. at 875. The rationale behind the "adversary proceeding" rule is 1) the State is subjected to the "indignity" of a required appearance in a judicial tribunal, citing Seminole Tribe of Florida v. Florida, 517 U.S. at 58, and 2) the Bankruptcy Court exercises in personam jurisdiction over the state resulting in a decision that binds the State. Id. at 876. In dicta, the Chandler Court recognized that some cases find that contested matters are not "suits" when monetary recovery or dispossession of assets from a State are not sought.[14] Id. at 876. This limitation on the definition of a suit is undesirable because it puts form over substance. Id. at 877.

The Debtor in this case is proceeding by way of a motion rather than an adversary proceeding. The motion, although phrased in terms of requesting a declaration that the Director and State would be in violation of the Bankruptcy Code if the Director failed to transfer the liquor licenses, is essentially seeking to compel the Director and State to

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[14] The Eleventh Amendment precludes "suits in law or equity." This contested matter essentially seeks injunctive relief against the State, indisputably a cause of action in equity.

transfer the licenses. This relief, however, is substantially the type obtained by way of an adversary proceeding. See Federal Bankruptcy Rule 7001:

> An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings: ...
> (7) a proceeding to obtain an injunction or other equitable relief ... [or]
> (9) a proceeding to obtain a declaratory judgment relating to any of the foregoing...

This "motion" is subjecting the state of New Mexico to the "indignity" of an appearance in Bankruptcy Court, and is attempting to bind the State with its ruling. Compare Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. 261, 281 (1997)(Tribe's suit was the "functional equivalent" of a quiet title action against the state.) Based on the foregoing, especially the role of the Director in overseeing the state's liquor laws, the Court finds that the Debtor's Motion is an impermissible "suit" within the contemplation of the Eleventh Amendment.

The Court also finds that Ex parte Young, 209 U.S. 123 (1908) does not apply. "Under the Ex parte Young doctrine, 'the Eleventh Amendment generally does not bar a suit against a state official in federal court which seeks only prospective equitable relief for violations of federal law, even if the state is immune.'" Hart v. Valdez, 186 F.3d 1280, 1286 (10th

Cir. 1999)(Citations omitted.) First, the Court finds that Section 60-6B-3 is a valid state property law and its enforcement by the Director is not a violation of federal law.[15] Second, the Eleventh Amendment bars a suit against state officials when the state is the real, substantial party in interest. Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 101 (1984)(Citations omitted.) "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'" Id. at n.11 (quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)). Debtor is attempting to force the state to act to permit transfer of the liquor licenses. The State of New Mexico is the real party in interest, and therefore Ex parte Young does not apply.

RIPENESS

Debtor's motion, paragraphs 8(b) and (c), ask the Court to declare that the Director of the New Mexico Alcohol and

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[15] "The Young doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the state cannot cloak the officer in its sovereign immunity." Idaho v. Coeur d'Alene Tribe of Idaho, 521 U.S. at 288 (Justice O'Connor, concurring in part and concurring in the judgment) (citing Ex parte Young, 209 U.S. at 159-160).

Gaming Commission would be in violation of Bankruptcy Code sections 362 and 525 respectively "if the Director were to condition his approval of the transfer of the Liquor Licenses to Purchaser or its designees upon payment in full to the Liquor Wholesalers." The Debtor does not allege that it has asked the Director to make any transfer, or that the Director has refused to make a transfer.

Federal courts cannot grant declaratory relief unless a controversy exists. Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 272, 61 S.Ct. 510, 512 (1941). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. at 273, 61 S.Ct. at 512.

However, in this instance the Director entered into a stipulation (docket 793) with the Debtor which provides, at 2, as follows:

> The Division will abide by and comply with the Court's decision in this Contested Matter, without the necessity of the Debtor commencing an adversary proceeding or obtaining an injunction to enforce the decision, and without the necessity of the Court ordering the Division to so comply.

Without deciding whether an assistant attorney general or, for that matter, the Director has the requisite authority to waive the State's Eleventh Amendment immunity in part or in whole, the Court is clear that the effect of the stipulation is to present a substantial controversy to this Court with sufficient immediacy and reality to warrant a ruling from the Court. In addition, courts generally have tended to find ripeness when the issues presented for decision are purely or mostly legal, as is the case here. See In re Space Building Corporation, 206 B.R. 269, 272 (D. Ma. 1996)("For an issue to be appropriate for judicial review, it should be 'purely legal' and 'final'.")(quoting Abbott Laboratories v. Gardner, 387 U.S. 136, 152, 87 S.Ct. 1507, 1517 (1967)).

TWENTY-FIRST AMENDMENT

The Debtor argues, and MetLife concurs, that "no genuine argument can be made that Section 60-6B-3 is anything but a statue with the sole purposes of aiding private debt collection." Debtor's Memorandum in Support of Debtor's Motion, at 24, n. 24. Docket 773. Indisputably §60-6B-3 is a debt collection provision. However, the same can be said of state statutes that create lien priorities, provide for the

establishment and enforcement of liens, etc.[16] See above at note 10. The mere fact that the statute aids private debt collection does not make it run afoul of the Bankruptcy Code. Particularly is this the case when the statute is part of the state law that applies to all such transactions, regardless of whether the debtor is in bankruptcy or not, and thus requires compliance pursuant to 28 U.S.C. §959(b). Thus, the Court need not decide whether the statute is an integral part of the exercise of the State's Twenty-First Amendment rights.

WAIVER BY WHOLESALERS

28 U.S.C. §959(b) requires the estate to comply with the provisions of state law. Section 60-6B-3 is one of those laws. The provisions of the DIP Financing Order do not constitute sufficient grounds to disregard state law. Further, the DIP Financing Order and related notices sought to ensure that MetLife and the other lenders had a priority for their liens. Nothing in the order or the notices announced an intention to override state law. And finally, if MetLife and the other

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[16] "State law often vests some creditors with special rights, sometimes called 'liens' or 'security interests,' that enable certain creditors to collect ahead of general creditors in bankruptcy. The inherent purpose of any such lien of incumbrance is to give the holder of the lien a position superior to other creditors in a particular asset." In re Anchorage International Inn, Inc., 718 F.2d at 1450, n. 3. (Emphasis in original.)

lenders sought to determine the validity, priority or extent of the wholesalers' liens, they may have needed to bring an adversary proceeding against the wholesalers to accomplish that. The provisions of Federal Bankruptcy Rule 7001(2) make it clear that the "negative notice" process employed in obtaining approval for the DIP Financing Order is insufficient to void validly existing liens such as these.

A wholesaler can waive a lien or some other protection to which it is entitled. See In re D & M, Inc., 114 B.R. at 277 (by their actions of agreeing to a sale free of liens with proceeds going into escrow, wholesalers waived argument whether §60-6B-3 creates a condition precedent to the transfer of the license). And MetLife argues vigorously that at least two wholesalers, Desert Eagle and Joe G. Maloof, waived the priority of their lien rights by failing to timely object to the entry of the DIP Financing Order.[17] Metropolitan Life Insurance Company's Reply, at 5-8. Whatever waiver may have occurred with respect to lien priorities generally by these two wholesalers, it is clear that none of the six wholesalers involved in this contested matter knowingly and voluntarily

[17] It appears that MetLife tacitly concedes that Premier Distributing Company, Inc., National Distributing Company, Inc., New Mexico Beverage Company, Inc. and Southern Wine & Spirits, Inc. all timely filed objections and have not waived any of their rights.

waived the right to be paid in full on transfer of the licenses. As in Wedgewood Investment Fund v. Wedgewood Realty Group, Ltd. (In re Wedgewood Realty Group, Ltd.), 878 F.2d 693, 698-99 (3rd Cir. 1989), cited by MetLife, nothing that the lenders did would have put the wholesalers on notice that they were giving up their rights to be paid on transfer, and thus Desert Eagle's and Maloof's failure to act can not be construed as a waiver. And to the extent that the claims of Desert Eagle and Maloof all predate the filing of the chapter 11 petition and therefore of any notice of the DIP Financing Order, as is stated in MetLife's Reply at 8 (docket 905), they cannot be said to have waived the priority of their claims.

REMAINING ISSUES

Wholesalers' claims entitled to be paid, or to be addressed by "satisfactory arrangements", include invoices for alcoholic beverages delivered by the wholesalers, even if such deliveries occurred after the effective date of the Debtor-in-Possession financing order and even if the deliveries violated the thirty-day rule set out in NMSA 1978, §60-7A-9. In re D & M, Inc., 114 B.R. at 278. Obviously, such claims would not include invoices for alcoholic beverages not delivered.

Presumably if the estate has set aside funds covering all the wholesalers' claims for product delivered[18], and is prepared to deliver those funds during the ordinary course of a closing of the license transfers, the Director would find that the wholesalers "have been paid" by these arrangements, or at least that these are "satisfactory arrangements".[19] The Court will therefore order that the wholesalers provide the correct figures to the estate no later than Thursday, August 30, at 9.00 pm (Mountain Time), and such additional information as the Debtor and others may request, to ensure that the estate has the time and documentation to confirm that the figures are correct prior to any closing activities on Friday, August 31. To the extent that the wholesalers have already provided the requisite information, they need not provide it again. Based at least on a previous hearing at

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[18] Setting aside sufficient funds for payment at closing to cover the value of a license, as suggested by MetLife in its Reply at 8-9, if that sum is less than the total of the wholesalers' liens, would not be in compliance with the statute.

[19] The Director objects to the proposed escrow agreement because "it suffers [sic] the Wholesalers to the vagaries of the pending adversarial proceeding, and allows for the possibility that the licenses will be transferred to other creditors... without payment of the liens." AGD Memorandum, at 5-6. Docket 797. Nothing in §60-6B-3 suggests it is intended to insulate wholesalers from litigation to establish their claims. However, the statute does directly attempt to ensure payment of the liens before or at transfer.

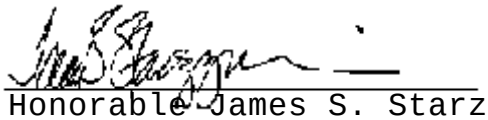
which the Court ordered the exchange of documentation and information between the wholesalers and the lenders, the deadline set by the Court in this memorandum opinion and order for the wholesalers to deliver any remaining undelivered information should not be a burden on the wholesalers. The Court of course retains jurisdiction over the parties, including the wholesalers, to deal promptly with the potential issue of any overpayment to the wholesalers.

Finally, during the course of much of the briefing period for this contested matter, the Court was prohibited from ruling on issues concerning Heller Financial because of a potential financial interest. Canon 4(C)(1)(c) of the Code of Conduct for United States Judges; 28 U.S.C. §455(b)(4). The Court has now divested itself of the financial interest. Heller may want to (re)argue the "waiver" issue, particularly in light of its motion for summary judgment on that ground, among others, in the pending adversary proceeding styled and numbered Premier Distributing Company, Inc. v. Heller Financial, Inc., No. 01-1073. Should Heller file a motion for rehearing or for similar relief, the Court's ruling requiring full payment of the wholesalers' liens as a condition to transfer will remain in effect until further order of the Court. (That was, after all, the status quo when the Debtor

filed its motion.) The Court's continuing jurisdiction over the wholesalers ensures that such a request by Heller would not be moot.

CONCLUSION

For the foregoing reasons, the Court will deny the Debtor in Possession's Motion for Order Determining that the Director of the New Mexico Alcohol and Gaming Division May Not Condition Approval of the Transfer of Debtor's Liquor Licenses upon Payment in Full to Liquor Wholesalers (docket 737), and require the delivery of the information as described in this memorandum opinion.



Honorable James S. Starzynski
United States Bankruptcy Judge

I hereby certify that on August 29, 2001, a true and correct copy of the foregoing was either electronically transmitted, faxed, delivered, or mailed to the listed counsel and parties.

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